F. M. S. REPORTS.

[APPELLATE CIVIL JURISDICTION]

HORNE, J.

August 15, 1940.

SALI BINTI HAJI SALLEH
v.
ACHIK ALIAS BACHIK BIN ENOT & ORS.

[CIVIL APPEAL No. 2 of 1940]

[KUALA PILAH DISTRIBUTION SUIT No. 87 of 1938]

Customary Tenure Enactment (Cap. 215), S. 4—Probate and Administration Enactment (Cap. 8), S. 179—Distribution Enactment—Land not endorsed "customary land"—no proof that land is not occupied subject to custom—distribution.

The Customary Tenure Enactment (Cap. 215) applies only to land which has become ancestral land (harta pesaka) and does not deal with land which, according to the custom, changes its character from acquired to ancestral property upon a devolution consequent upon the death of the acquirer or first owner.

The absence of an endorsement on the title of land does not preclude the Collector from holding on the evidence before him that the land is occupied subject to custom.

In re Haji Mansur deceased, 9 M.L.J. 110 applied.

In cases where the title is not endorsed "customary land" the Collector must consider what the personal law of the deceased is. Such personal law may be rules of Muhammadan law as varied by local custom.

In an application for distribution of a small estate in the District of Kuala Pilah, one of the customary districts, the Collector granted letters of administration and ordered the Administrator to sell the land of a deceased person and divide the proceeds of sale among those entitled to share according to Muhammadan law. The Collector refused to apply the local customary rule because the title of the land of the deceased had not been endorsed "customary land." In an appeal against the order of the Collector to the Court of a Judge.

Held, that the local rule applicable to the district in question having been sufficiently proved as a customary rule in this case, the Collector should have applied the rule and endorsed the title "customary land" under Section 4 (1) of the Customary Tenure Enactment.

Cases referred to:—

(1) *In re Haji Mansur,* 9 M.L.J. 110; (1939) F.M.S.L.R. 73.

(2) *Kutai bin Haji Lateh v. Taensah binte Haji Enoh,* 3 M.L.J. 251; (1933-34) F.M.S.L.R. 304.

APPEAL from the order of the Collector.

Tengku Ismail for the Appellant.

Horne, J.—This appeal is from the order made by the Collector in an application for the distribution of a small estate. It is submitted that the Collector has disregarded the local custom governing the distribution of the land of the deceased. The Collector granted Letters of Administration and ordered the Administrator to sell the land and divide the proceeds among the persons entitled to share according to Muhammadan Law. In his view there can be no question of applying a local customary rule because the land title had not been endorsed "Customary Land."

The Collector's order was made before Cussen, J. gave judgment in the reference No. 101/39 *In re Haji Mansur,*[1] and followed the decisions previously given by this Court to the effect that if the title is not endorsed "Customary Land" the Collector should order a distribution according to Muhammadan Law.

The first decision to this effect was given in 1934 by Mudie, J. (*Kutai bin Haji Lateh v. Taensah binti Haji Enoh,*[2]. There are two lines of decision, one commencing in 1934 and the other from some uncertain date in the past which conforms generally to the view taken by Cussen, J. Before 1934 there had been decisions recognizing *adat* rules of succession given by Acton, J. in 1926 (*In re Kulup Kida,* N.S. Petition for Letters of Administration No. 106/26) and Burton, J. in 1928 (N.S. Civil Appeal No. 21/28). According to Acton, J. in P.A. 106/26 the custom of Rembau had been previously recognized by the Court: he referred to *Innes* on Land Registration.

If Cussen, J. is right the Collector's decision is wrong and the Collector ought not to have held that he could not order a distribution according to the local rules because the title was not endorsed "Customary Land."

In my opinion if it was so endorsed the Collector would be unable to deal with the land under the Probate and Administration Enactment; for both section 10 (iv) of Chapter 215 and section 176 of Chapter 8 exclude such property from any of the provisions of the Probate and Administration Enactment.

Although I adopt the decision of Cussen, J. in *In re Haji Mansur,*[1] I do not adopt his reasons and as there is a conflict of decisions I prefer to approach the matter in my own way.

In my opinion the Customary Tenure Enactment (Chapter 215) has no application to the question before the Collector. Upon examination of the interpretation section and section 4, it appears to me that the enactment only applies to land which had already become ancestral land (*harta pesaka*). It does

not deal with land which, according to the custom, changes its character from acquired to ancestral property upon a devolution consequent upon the death of the acquirer or first owner. "Customary Land" is thus given a limited meaning and applies to land with an endorsed title. The endorsement of the words "Customary Land" upon the entry in or the extract from the Mukim Register can be made in two cases:—

(a) On proof that the land is occupied subject to the custom and that the entry is in the name of a female member of the tribe—section 4 (i).

(b) The title of land alienated by the State to a female member of the tribe may be so endorsed with her consent: that is to say, that her acquired property may with her consent be earmarked as ancestral without waiting for a devolution—section 4 (ii).

As such an endorsement is to be taken as "conclusive proof" that the land in question "is occupied subject to the custom," this latter phrase must be taken as meaning ancestral land. If acquired land is to be included under the description "occupied subject to custom" then the acquired land of a female registered proprietor could be endorsed under section 4 (i), while yet under section 4 (ii) when she acquires it from the State it can only be endorsed at her option. Again the expression "Customary Land" used in section 176 of Chapter 8 must I think also be construed as ancestral land. For otherwise that section will not fit in with Chapter 215.

The Collector was therefore wrong in holding that the absence of an endorsement precluded him from considering the evidence before him.

If the rules of Muhammadan Law are then to be applied it must be for some reason other than the lack of endorsement. The Collector seems inclined to the view that Muhammadan Law applies because the land was alienated to the deceased by the State, is under rubber, and the deceased, the alienee, is a male. But as all acquisitions of unalienated land must derive from the State this hardly seems a reason. On the other hand he finds that three lembagas consider that the devolution of the land in question should be governed by the "*adat.*" One of them, I might add, is the lembaga of Sri Lemak tribe, four female members of which stand to receive 234/936 of the proceeds of sale if the Muhammadan Law rule governs the distribution, and nothing if the customary rule applies.

It seems to me that in such a case as this the Collector must consider what is the personal law of the deceased or as it is put in section 179 of the Probate and Administration Enactment "the rules for the distribution of the estate of an intestate applicable in the case of the deceased." I think myself that the expression "the rules of Muhammadan Law as varied by local custom" used in the Distribution Enactment (Chapter 71) might describe this law, it being understood that the dictionary meaning of "to vary" includes "to substitute." At present the body of law so described is in a state of flux or of development. It is sometimes difficult to ascertain. It varies in different districts. It is compounded of Muhammadan Law and custom in different degrees when examined in relation to different subjects. Custom in turn is affected by Muhammadan Law and by the extension of opportunities for the acquisition of property. Some of this law is found in works of authority on Muhammadan Law and some is found in enactments (e.g. Customary Tenure, Muhammadan Marriage and Divorce, and Muhammadan Offences), and some in recorded decisions (*Taylor's* Collection of Cases in Customary Law of Rembau 1929), and in the Law Reports; but a considerable amount still remains oral customary law and is supposed to be known to the lembagas.

Nevertheless from a consideration of the sources mentioned, it appears that although there have been disputes as to succession of property in the past, it was not held authoritatively until 1934, eight years after the passing of the present Customary Tenure Enactment, that the customary rules of succession were no longer applicable and that the unvaried rules of Muhammadan Law were to be applied to all property other than that which had already become ancestral. I agree with Cussen, J. that if the Legislature desire that result they must say so in clear terms. If they desired it by Chapter 215 it is strange that eight years had to elapse before the Court gave a decision that the Enactment effected that desire.

In this case I think the local rule was sufficiently proved as a customary rule, which is followed in that district in variation of Muhammadan Law in all similar cases, by the three lembagas who gave expert evidence before the Collector. The rule is that where a male member of the tribe acquires property, upon apportionment at the time of dissolution of a previous marriage and marries again that property is *harta pembawa.* If it is declared at the time of the subsequent marriage, it goes to his nearest female relative under the *adat* on his death.

It is agreed by all parties at the hearing of the appeal that if that rule is adopted the land must go to the appellant.

The appeal is allowed and the Collector's order set aside and it is ordered that the land be transmitted to the appellant. No order as to costs.

The matter now being in the hands of the Collector, he is entitled under section 4 (i) of Chapter 215 to endorse the title "Customary Land."

Appeal allowed.

[REVISIONAL CRIMINAL JURISDICTION]

HORNE, J.

August 17, 1940.

JEMIAH BINTI AWANG

v.

ABDUL RASHID BIN HAJI IBRAHIM.

[NEGRI SEMBILAN MISCELLANEOUS APPLICATION No. 10 of 1940]

[KUALA PILAH SUMMONS CASE No. 201 of 1940]

Maintenance—children of parents following the Adat—divorce of mother—father practising polygamy —whether children entitled to maintenance.

The rule that under the Adat a husband after divorce is not liable for the support of his children by his divorced wife does not apply where the husband is lawfully practising polygamy.

CRIMINAL REVISION.

The parties in person.

Horne, J.—In this matter the record has been called for under the provisions of section 323 of the Criminal Procedure Code. Both parties have appeared and have been heard.

The applicant summoned her husband, the respondent, before the Magistrate, Kuala Pilah, for an order for maintenance of her two children aged 4 and 9 years respectively. The Magistrate refused the application on the ground that there is a judgment of this Court (Registry N.S. 226/33) to the effect that under the *adat* after divorce a husband not being entitled to the custody of the children is not liable for their support.

That case is not very helpful. The evidence is sketchy, but apparently the mother had died and her sister (probably her customary heir), who was the complainant, had taken the four children aged 14, 12, 11 and 1½ years. The father, the respondent, appears not to have any other wife and had returned to live with his own female relations. He also owned land. It was held by Mudie, J. that as the respondent-defendant was not entitled under the *adat* to the custody, he was not liable for their support and the Magistrate's order for maintenance was set aside.

In another case, Registry N.S. No. 124/34, the father had been ordered to pay maintenance in respect of three children of his divorced wife who applied for their maintenance. The case was further enquired into on the order of Mudie, J. and it was established that the complainant and her late husband were members of tribes which followed the *adat*. The husband had not remarried. There had been a division of property on divorce. The Magistrate ordered maintenance, but the learned Judge set the order aside on the same grounds as in the earlier case.

In the case now before me the respondent and the appellant are both members of tribes which follow the rules of customary law to a degree which is not always easy to establish. The proceedings here are criminal in form, but whether an order can be made in such proceedings depends upon the civil rights of the parties.

The respondent is employed in the public service at a salary of $105.00 *per mensem*. His first wife is dead leaving one child. He admits before me he pays the school fees for that child. He then married the appellant and they had two children. He then married another female member of the same tribe paying the extra fee the custom demands. His case is that he is under the *adat* and having divorced his wife, she and her children go to their tribe, i.e. her female relatives, and he is not liable. As I understand the matter the *adat*, at least originally, permitted only monogamous marriages (Rembau History, *Parr and Mackray*, page 77 *et seq.*). But the respondent is a person who is lawfully practising polygamy, and as he cannot do so lawfully under the *adat*, I think it right to regard him as a person whose civil rights and duties in respect of wives and children fall to be dealt with under "the rules of the Muhammadan Law as varied by local custom."

One of the lembagas called before the Magistrate took the view that the children go to the mother and the father is not liable to maintain them. Such a rule appears to work well when there is ancestral property held by the mother or her near relatives. In this case it is alleged and not denied that neither the appellant nor her mother has any ancestral property and that the appellant and her children reside with her parents on the father's land.

The more senior lembaga (Dato Senara Muda) stated the custom similarly, but added that if the mother